In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1046

EVERTT W. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-9; R. 235-243) is reported at 342 F. 2d 137.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1965 (Pet. App. 10-11; R. 244). A petition for rehearing was denied on March 12, 1965 (Pet. App. 12; R. 286). The petition for a writ of

certiorari was filed on April 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the search of an automobile by officers having probable cause to believe contraband liquor was contained therein was reasonable.

2. Whether petitioner, who voiced no objection when informed by the court prior to verdict of a communication between a juror and a co-defendant, was entitled to a new trial on the ground that a deputy marshal who informed the court of the incident had spoken to the juror regarding the incident.

3. Whether petitioner's conviction must be reversed because of a claimed variance between indictment and proof in the conspiracy count.

STATEMENT

An eighteen count indictment returned in the United States District Court for the Southern District of Florida charged petitioner and four other defendants with a conspiracy to violate, and with substantive violations of, the Internal Revenue laws relating to distilled spirits (R. 1-15). Among individuals named with petitioner in the conspiracy count were defendant Earl Stokes and William Phillips and a co-conspirator (but not a defendant), Jerry Thorn. Petitioner was charged in nine substantive counts—in six of which the defendant Stokes was named. After a trial by jury petitioner was convicted on

each count under which he was charged. He was given concurrent sentences of 18 months on the conspiracy and six substantive counts, and fines of $1200 on each of three substantive counts.

Prior to and during trial, motions to suppress evidence of "moonshine" taken by officers during the search of certain automobiles were denied (See R. 67 *et seq.;* R. 164). Insofar as is pertinent here, this evidence may be stated as follows:

On April 3, 1962, Thorn, who had turned informer (R. 61), supplied information as to a contemplated delivery of illicit whiskey which led to the arrest, on April 4, of the defendant Stokes and the seizure, from his Buick car, of a large quantity of liquor (See generally R. 77-100).

On April 5, Thorn reported that in the evening, at the Dade Tire Company owned by petitioner, there would be a transfer of moonshine whiskey from a Chevrolet pickup truck owned by the defendant Phillips to a 1953 Chrysler automobile (R. 128, 150, 154). At about 6:30 p.m., agents saw parked in the company lot a Chrysler automobile which answered the description furnished by Thorn and a Chevrolet truck with the name "Phillips" printed on its side (R. 114). Moments later Thorn met Agent Glass a short distance from the lot and told him that the whiskey was then in the truck, awaiting transfer to the Chrysler. Glass relayed this to Investigator Scott on the scene (R. 111, 129). From a point approximately 60 to 80 yards from the vehicles, Agent Glass, using binoculars, saw petitioner and Phillips with Thorn, moving what appeared to be five gallon jugs in burlap

bags from the truck into the trunk of the Chrysler (R. 130, 131). He saw Phillips, accompanied by Thorn, then drive the truck out of the lot and down the street past his location. He notified the other officers (R. 132, 133, 137, 140).

Investigator Scott, in his car, followed the truck for a short distance to an intersection, where he pulled beside it. Phillips and Thorn jumped from the truck and ran. Investigator Scott caught Phillips and returned with him to the company lot where he opened the trunk of the Chrysler automobile and found ten five-gallon jugs of nontaxpaid whiskey (R. 111, 112, 117-119). At this time petitioner came over to the Chrysler automobile and denied knowledge of its ownership (R. 113, 125).

The Chrysler was parked on a portion of the Tire Company lot used for the wheel alignment business. This area of the lot was open to the public (R. 122, 149, 155). It was bounded on the west by a fence, on the south by a building, on the east by a fence with a small entrance, and on the north by a fence with a wide opening of approximately three car widths, through which the public entered and left the premises (R. 122, 154, 155).

ARGUMENT

1. Petitioner does not question the fact that the officers at the scene of his company lot had probable cause to believe that the Chrysler automobile contained contraband whiskey—a fact which brings into play the well established rule permitting the search

of a movable vehicle. *Carroll* v. *United States*, 267 U.S. 132; *Husty* v. *United States*, 282 U.S. 694; *Brinegar* v. *United States*, 338 U.S. 160. He argues, however, that under the circumstances of this case the search of the car was invalid because there was time to obtain a warrant. There is no merit to this contention.

The officers who saw the loading of the bags and containers from Phillips' truck into the Chrysler had no way of knowing how long the loaded car would remain there. The fact that, after Phillips drove away in his truck, the Chrysler was momentarily "unattended" did not change the mobile character of the vehicle. See *United States* v. *Haith*, 297 F.2d 65 (C.A. 4), certiorari denied, 369 U.S. 804. Cf. *Scher* v. *United States*, 305 U.S. 251. The claim that the car was then stationed on "largely enclosed property of a business corporation" is of no import. The entry on this lot, into which the public was invited, did not constitute an invasion of the right of privacy. See *United States* v. *Sorce*, 325 F.2d 84 (C.A. 7), certiorari denied, 376 U.S. 931; *Hester* v. *United States*, 265 U.S. 57; cf. *Marullo* v. *United States*, 328 F. 2d 361 (C.A. 5), certiorari denied, 379 U.S. 850.

2. Before court convened on the morning of final argument, defendant Phillips engaged in a conversation with a juror about matters not connected with the case. This was reported by a deputy marshal to the court, which in turn informed counsel for both parties. Both parties waived any claim of error (see Pet. 6), with defense counsel stating, "I make no

point of it" (R. 197). After conviction, in connection with motions for a new trial, the court permitted the defense to examine the deputy marshal. He testified that during a recess in the proceeding he stopped the juror out of the presence of the other jurors and questioned her briefly about the subject of her conversation with Phillips. He then told her not to mention it to anyone and thereafter reported it to the court (R. 209-213).

Petitioner claims that he did not know at the time the incident was raised during trial that the deputy marshal had talked with the juror and that this fact alone requires reversal of the conviction. However, as the court below noted, although the trial court advised counsel prior to the submission of the case that it was a deputy marshal who had reported the co-defendant's conversation with the juror, petitioner did not see fit to examine the marshal and treated the matter as inconsequential. The statements of the deputy marshal to the juror did not alter its inconsequential character. The denial of the motion for a new trial shows that the trial court did find—as the record showed—that the conversation was harmless. See *Remmer* v. *United States*, 347 U.S. 227, 229; *Mattox* v. *United States*, 146 U.S. 140.

3. The alleged variance as to the conspiracy count is immaterial, since the substantive counts are sufficient to support the sentence. Petitioner's possession of the whiskey delivered on April 5 was clearly established independently of the other evidence in the case, and the conviction on that count alone carried with it the full 18-month prison term. The variance

apparently arises from the fact that petitioner furnished the money and supplies for a still set up by Phillips and Thorn and bought the whiskey they manufactured. Stokes conducted operations at the same still but did not know of petitioner's involvement (See R. 52, 61). On the particular facts of this case, even though Stokes and petitioner did not know each other and were not co-conspirators,[1] each of them was guilty of the possession and operation of the same still as charged in some of the substantive counts.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1965

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[1] The trial court was of the opinion that there were two conspiracies (R. 185, 201). Although the court's instructions were not made a part of the record, the record does show that counsel contemplated that such instructions would protect the defendant's rights in this regard (R. 187).

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